SUPREME COURT OF THE UNITED STATES

JIMMY CAMPBELL ET AL. *v.* JAY BRUMMETT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 91-1515. Decided June 1, 1992

The petition for a writ of certiorari is denied.

JUSTICE WHITE, dissenting.

The Court once again declines to grant certiorari in a case in which the petitioners raise a subject of clear disagreement among the Courts of Appeals. Once again, I dissent. The questions presented concern whether 42 U. S. C. § 1983 provides a cause of action for malicious prosecution and, if so, when the cause of action accrues.

Respondent was prosecuted for failing to repay a loan to respondent First State Bank of Cleburne, Texas. The loan, for more than $30,000, had been collateralized by the equipment and inventory of his stereo business. Respondent, who said that he sold the inventory in the normal course of business, was indicted under a provision of the Texas Penal Code that makes it a felony to "remove" from the State collateral securing a debt. Tex. Pen. Code § 32.33. After three years of court appearances, the charge was dismissed for insufficient evidence.

Respondent sued the prosecuting attorneys, the county, the bank, and certain bank employees, alleging that they conspired to prosecute him maliciously in violation of state law and § 1983. The district court dismissed the action as to the county and the prosecuting attorneys on immunity grounds and entered summary judgment as to the remaining defendants on the ground that respondent's claims were time-barred.

The Court of Appeals reversed in relevant part.[1] Although it noted that there has been considerable confusion in the circuit courts concerning the availability and contours of a § 1983 malicious prosecution claim, see *Brummett* v. *Campbell*, 946 F. 2d 1178, 1180 n.2 (CA5 1991) (collecting cases), the court observed that recent Fifth Circuit cases "have assumed that malicious prosecution violates § 1983." *Ibid.* The court then held that respondent's claim was not time-barred because a cause of action for malicious prosecution under § 1983 does not accrue until the underlying prosecution has terminated in favor of the criminal defendant. *Id.*, at 1184.

The Third, Sixth and Tenth Circuits follow the rule that the Fifth Circuit applied here. See *Robinson* v. *Maruffi*, 895 F. 2d 649, 654 (CA10 1990); *Rose* v. *Bartle*, 871 F. 2d 331, 349 (CA3 1989); *McCune* v. *City of Grand Rapids*, 842 F. 2d 903, 907 (CA6 1988). However, the First Circuit has held that a malicious prosecution claim accrues at the time of arrest and not when the allegedly abusive proceeding comes to a conclusion, which may be years later. *Warden III, Inc.* v. *State of Rhode Island*, 576 F. 2d 945, 947 n. 5 (CA1 1978). The Ninth Circuit's treatment of the question has been inconsistent. Compare *Clive* v. *Brusett*, 661 F. 2d 108, 111 (CA9 1981) (following majority rule), with *Gowin* v. *Altmiller*, 663 F. 2d 820, 822 (CA9 1981) (following minority rule).

Clearly, this is an area of law that requires our attention. Therefore, I would grant certiorari to determine if a cause of action for malicious prosecution is available under § 1983 and, if it is, when the cause of action accrues.

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[1]The Fifth Circuit agreed with the district court that the prosecutors were immune, but vacated the judgment as to the county to allow "for further consideration in light of later events in trial court." *Brummett* v. *Campbell*, 946 F. 2d 1178, 1183 (CA9 1991). The county is not a party to this petition.